No. 98-1591

Supreme Court, U.S.
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In The Supreme Court of the United States

TERESA PICHOFF, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF BRUCE PICHOFF, DECEASED,

Petitioner,

vs.

QHG OF SPRINGDALE, INC., DBA NORTHWEST HEALTH SYSTEM, AKA NORTHWEST MEDICAL CENTER OF WASHINGTON COUNTY; TRIAD HOSPITALS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should review the Eighth Circuit's ruling that the monetary damages for which petitioner sued does not constitute "appropriate equitable relief" within the meaning of section 502(a)(3)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(3)(B), but instead, represents unauthorized legal relief.

In the past four years, this Court has twice denied certiorari on the same question, first in *Callery v. United States Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004), *cert. denied,* 546 U.S. 812 (2005), and most recently in *Amschwand v. Spherion Corp.*, 505 F.3d 342 (5th Cir. 2007), *cert. denied,* 128 S. Ct. 1493 (2008). Nothing in the statutory or common law of ERISA has changed to warrant revisiting the question now.

CORPORATE DISCLOSURE STATEMENT

Pursuant to SUP. CT. R. 29.6, respondents make the following corporate disclosures:

1. Triad Hospitals, Inc. is now known as Triad Healthcare Corporation;

2. The correct name for Northwest Health System is Northwest Arkansas Hospitals, LLC, d/b/a: "Northwest Medical Center – Willow Creek Women's Hospital" and "Northwest Medical Center" (Springdale, AR);

3. Northwest Arkansas Hospitals, LLC, is a syndicated entity, 99.72% of which is owned by QHG of Springdale, Inc., and .28% of which is owned by Parkhill Hospital Investment Group, LLC, and Northwest Arkansas Hospital Investment Group, LLC;

4. Northwest Arkansas Hospitals, LLC, is a Delaware limited liability company, 99.72% of which is owned by QHG of Springdale, Inc. and the remaining .28% by Parkhill Hospital Investment Group, LLC and Northwest Arkansas Hospital Investment Group, LLC. These entities together also own: Northwest Medical Center – Willow Creek Women's Hospital (Johnson, AR) and Northwest Medical Center (Springdale, AR);

5. QHG of Springdale, Inc., an Arkansas corporation, is wholly owned by Triad Holdings V, LLC;

CORPORATE DISCLOSURE STATEMENT – Continued

6. Triad Holdings V, LLC, a Delaware limited liability company, is wholly owned by Tennyson Holdings, LLC (f/k/a Tennyson Holdings, Inc.);

7. Tennyson Holdings, LLC, a Delaware limited liability company, is wholly owned by Triad Healthcare Corporation (f/k/a/ Triad Hospitals, Inc.);

8. Triad Healthcare Corporation, a Delaware corporation, is wholly owned by CHS/Community Health Systems, Inc.; and

9. CHS/Community Health Systems, Inc., a Delaware corporation, is wholly owned by Community Health Systems, Inc., a publicly traded Delaware corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Procedural History	1
B. Relevant Facts	3
REASONS TO DENY THE PETITION	3
I. Introduction	3
II. The Eighth Circuit Correctly Applied Binding Precedent of This Court	5
III. The Circuit Courts Have Unanimously Rebuffed Petitioner's Arguments	9
CONCLUSION	13

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Amschwand v. Spherion Corp., 505 F.3d 342 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1493 (2008) 3, 11, 12

Calhoon v. Trans World Airlines, Inc., 400 F.3d 593 (8th Cir. 2005) 10, 11, 13

Callery v. U.S. Life Ins. Co., 392 F.3d 401 (10th Cir. 2004), *cert. denied*, 546 U.S. 812 (2005) 10

Coan v. Kaufman, 457 F.3d 250 (2d Cir. 2006) 9

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) 4, 6, 7, 8, 9

Helfrich v. PNC Bank, Ky., Inc., 267 F.3d 477 (6th Cir. 2001) 9

Kerr v. Charles F. Vatterott & Co., 184 F.3d 938 (8th Cir. 1999) 9

Knieriem v. Group Health Plan, Inc., 434 F.3d 1058 (8th Cir. 2006) 5, 9, 10

Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 4

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 3, 4, 5, 6, 8

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 4

Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356 (2006) 7, 8, 9

Todisco v. Verizon Commc'ns, Inc., 497 F.3d 95 (1st Cir. 2007) 12

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

29 U.S.C. § 1109 1
29 U.S.C. § 1132(a) 3
29 U.S.C. § 1132(a)(3) 8, 13
29 U.S.C. § 1132(a)(3)(B) 3, 4, 5, 13
29 U.S.C. § 1144(a) 1

SUPREME COURT RULES

SUP. CT. R. 10 5
SUP. CT. R. 29.6 ii

STATEMENT OF THE CASE

A. Procedural History

Although not inaccurate, petitioner's statement of the case is incomplete. A more complete recitation of the proceedings below illuminates what petitioner endeavors to obscure: that this action is one to recover compensatory damages – that is, quintessentially legal relief – for losses purportedly sustained as a result of the respondents' alleged breach of fiduciary duties.

As originally cast, petitioner's complaint advanced under Arkansas law causes of action for negligence, for breach of fiduciary duty, and for fraud. The genesis of each claim was the supposed failure of respondents to "properly advise and inform" petitioner's husband, Bruce Pichoff, M.D. ("Dr. Pichoff"), of his "rights and/or options" under the group life insurance component of the employee welfare benefit plan ("the Plan") in which he participated. As a result of the representations attributed to respondents, petitioner claimed that Dr. Pichoff suffered "a substantial loss of value of his life insurance coverage" under the Plan.

Respondents moved to dismiss the complaint on the ground that the state law claims asserted therein were preempted by section 514(a) of ERISA, 29 U.S.C. § 1144(a). Petitioner tried to avoid dismissal by twice amending the complaint to assert a claim for breach of fiduciary duties under 29 U.S.C. § 1109. In each iteration, it was alleged that respondents caused

Dr. Pichoff "considerable harm," for which they should atone by paying damages commensurate with the "loss of value of his life insurance coverage."

Respondents moved to dismiss the amended complaints, as well, maintaining, among other things, that the relief for which petitioner prayed was legal, rather than equitable in nature. Unable to refute this position, petitioner corroborated it by urging the district court to "award a judgment in the amount of the life insurance [coverage] that [Dr.] Pichoff had in effect before he was intentionally or negligently misled regarding the operation of the life insurance plan."

The district court initially recognized that "if money damages are not available" under section 502(a)(3) of ERISA, petitioner would "have no remedy at all." The court next determined that this section prescribed no remedy for petitioner because money damages are a form of legal relief. "This follows," the court explained, "because the remedy here sought – recoupment of the amount of life insurance coverage that was in effect before [Dr.] Pichoff's first medical leave – is measured by the loss to [petitioner] rather than the gain to [respondent], and the funds being sought are not such as can be clearly traced to funds in [respondent's] possession."

Petitioner appealed to the Eighth Circuit, arguing that the "made-whole relief" she requests is of equitable origin. "[B]ound by the precedent . . . of the Supreme Court," the Eighth Circuit rejected

petitioner's argument, holding that "[s]uch relief . . . is compensatory in nature and unavailable under § 1132(a)(3)(B)."

B. Relevant Facts

Respondents understand that, for present purposes, they must accept as true the factual allegations set out in petitioner's complaint. Respondents must emphasize, however, that those allegations make this case materially indistinguishable from *Amschwand v. Spherion Corp., supra,* in which this Court last year declined to review the identical legal issue presented here, namely, whether section 502(a)(3)(B) of ERISA permits recovery of make-whole damages "in the form of payment of life insurance benefits that would have accrued to a plan beneficiary but for a plan fiduciary's breach of fiduciary duty." *Amschwand*, 505 F.3d at 343.

REASONS TO DENY THE PETITION

I. Introduction

ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Its civil enforcement provision thus stops short of furnishing ERISA complainants with the panoply of remedies universally afforded by state law. 29 U.S.C. § 1132(a). "[T]he inclusion of

certain remedies, and the exclusion of others," is the product of "policy choices" made by Congress in order to enact ERISA. *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 54 (1987).

The "evident care" with which ERISA's civil enforcement scheme was crafted itself provides "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 147 (1985) (emphasis in original). This evidence is all the stronger given that the remedial scheme is an integral part of a "comprehensive and reticulated statute." *Id.* (Citation omitted).

In light of this evidence, the Supreme Court has repeatedly declined invitations "to tamper with [the] enforcement scheme embodied in [ERISA] by extending remedies not specifically authorized by its text." *Id.* at 147. On each occasion, the Court cautioned that "vague notions of [the] statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 220 (2002) (quoting *Mertens,* 508 U.S. at 261) (emphasis in original).

The specific issue under consideration in this case is whether petitioner's claim for money damages is cognizable under 29 U.S.C. § 1132(a)(3)(B). That question must be answered in favor of respondents because "Supreme Court and . . . circuit [court]

precedent precludes an award of compensatory damages under section 1132(a)(3)(B)." *Knieriem v. Group Health Plan, Inc.*, 434 F.3d 1058, 1061 (8th Cir. 2006).

In urging the Court to revisit this issue, petitioner cannot show that the Eighth Circuit deviated from controlling pronouncements concerning the ambit of ERISA's remedial scheme. Nor can she demonstrate that the Eighth Circuit's decision conflicts with those rendered by any of its sister circuits. There are, then, no "compelling reasons" for the petition to be granted. *See* SUP. CT. R. 10.

II. The Eighth Circuit Correctly Applied Binding Precedent of This Court

Section 502(a)(3)(B) of ERISA allows a participant, beneficiary, or fiduciary to obtain, *inter alia,* "appropriate equitable relief." 29 U.S.C. § 1132(a)(3)(B). The nature and scope of the relief available under this provision has been circumscribed by a trilogy of Supreme Court decisions beginning with *Mertens v. Hewitt Assocs., supra.*

In *Mertens*, the Court emphasized that the word "equitable" is one of limitation, encompassing only "those categories of relief that were typically available in equity. . . ." *Mertens*, 508 U.S. at 256. Excluded from those categories are money damages, which "are, of course, the classic form of *legal* relief." *Id.* at 255. (Emphasis in original).

The Court refused to construe the word "equitable" in a way that would embrace "whatever relief a common-law court of equity could provide. . . ." *Id.* at 257. Such a reading, the Court observed, would "limit the relief *not at all,*" and "render the modifier ['equitable'] superfluous." *Id.* (Emphasis in original). The Court reasoned that other sections of ERISA expressly refer to "equitable or remedial relief," and "legal or equitable relief," thereby evincing that "equitable relief" within the meaning of section 502(a)(3) connotes only a subset of the full remedial spectrum. *Id.*

The Court reexamined the scope of section 502(a)(3) in *Great-West Life & Annuity Ins. Co., v. Knudson, supra.* In so doing, the Court revived the dichotomy between legal and equitable relief that Congress codified in ERISA.

Knudson was an action to enforce a reimbursement provision of an ERISA plan. *Great-West* sought restitutionary relief requiring that a beneficiary on whose behalf medical expense benefits were paid under the plan restore to the plan the equivalent amount recovered from a third party tortfeasor. *Knudson*, 534 U.S. at 206-08.

Although restitution was mentioned in *Mertens* as "typically equitable" relief, the Court clarified that "not all relief falling under the rubric of restitution is available in equity." *Id.* at 212. Whether restitution is legal or equitable, the Court continued, "depends on the basis for [the plaintiff's] claim and the nature

of the underlying remedies sought." *Id.* at 213. (Internal quotation and citation omitted). The crucial distinction between the two historical species of restitution is that equitable restitution seeks only "to restore to the plaintiff particular funds or property in the defendant's possession," whereas legal restitution "imposes personal liability for a contractual obligation to pay money – relief that was not typically available in equity." *Id.* at 213-14.

Following this analytical construct, the Court held that the action brought by *Great-West* was not authorized under section 502(a)(3) because the "funds to which [it] claimed an entitlement were not in the Knudson's possession." *Id.* at 214. Hence, the action impermissibly sought to impose personal liability on the Knudsons for a contractual obligation to pay money. *Id.*

The Court in *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006), echoed and amplified the law-equity dichotomy articulated in *Mertens*. It likewise reaffirmed the centrality of the possession requirement announced in *Knudson*.

Like *Knudson*, *Sereboff* involved a claim for restitution. *Sereboff*, 547 U.S. at 362-64. Unlike *Knudson*, though, that claim was permitted to proceed under section 502(a)(3), because Mid-Atlantic sought to impose a constructive trust or equitable lien on "specifically identifiable funds that were in the possession and control of the Sereboffs," not on the general assets of the Sereboffs. *Id.* In contrast to

Great-West, then, Mid-Atlantic did not seek "to impose personal liability . . . for a contractual obligation to pay money." *Id.* at 363 (quoting *Knudson,* 534 U.S. at 210).

Mertens and its progeny compel the conclusion that the remedy for which petitioner prays – life insurance benefits that [allegedly] should have been available to [her] family (Pet., p. 12) – falls outside the ambit of section 502(a)(3). As in *Mertens,* what petitioner "in fact seek[s] is nothing other than compensatory damages – monetary relief for all losses . . . sustained as a result of the alleged breach of fiduciary duties." *Mertens*, 508 U.S. at 255.

As in *Knudson*, moreover, petitioner cannot denominate the relief as equitable in nature because she cannot allege that the funds owed her are in respondents' possession. Rather, all she can allege is that the funds never materialized. Petitioner thus gauges her recovery not by the value of respondent's nonexistent gain, but by the value of her own loss – a measure that is traditionally legal, not equitable.

Petitioner nonetheless posits that *Sereboff* "abandon[ed] the holdings in *Mertens* and *Great-West,* and supports a much more expansive reading of the equitable relief available under 29 U.S.C. § 1132(a)(3)." (Pet., p. 13.) This postulate betrays a misapprehension of *Sereboff* and its progenitors.

Mertens and *Sereboff* are entirely consistent in defining and refining the distinction between legal relief and equitable relief. And viewed together,

Knudson and *Sereboff* illustrate that unjust enrichment or unlawful possession of funds is essential to characterizing relief as "equitable." The absence of unjust enrichment or unlawful possession, the cases harmoniously instruct, is fatal to a claim for relief premised on section 502(a)(3).

Contrary to petitioner's bald assertion, then, the governing Supreme Court precedent is anything but "muddled." (Pet., p. 10.) Indeed, as shown below, the circuit courts of appeal have experienced no trouble discerning its composite command.

III. The Circuit Courts Have Unanimously Rebuffed Petitioner's Arguments

Before confronting this appeal, the Eighth Circuit had consistently held that "money damages for harm suffered as a result of the breach of fiduciary duty" typify the "compensatory relief" prohibited by section 502(a)(3)(B) of ERISA. *Knieriem, supra,* 434 F.3d at 1060-61. *Accord Kerr v. Charles F. Vatterott & Co.,* 184 F.3d 938 (8th Cir. 1999). So, too, has every other circuit court that has addressed the issue. *See, e.g., Coan v. Kaufman*, 457 F.3d 250, 263 (2d Cir. 2006) (claim for injunction requiring fiduciary to restore funds to defunct 401(k) plan for distribution to former participants "does not transform what is effectively a money damages request into equitable relief"); *Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477, 482-83 (6th Cir. 2001) (claim to recover the difference between "the amount [plaintiff] would have earned"

had the fiduciary followed his investment instructions and "the amount he in fact earned" as a result of the fiduciary's failure to follow those instructions impermissibly sought money damages measured by plaintiff's own loss rather than defendant's ill-gotten gain); *Callery v. U.S. Life Ins. Co., supra* (money damages equal to the life insurance benefits a beneficiary would have received but for the fiduciary's breach are not recoverable under section 502(a)(3)(B)).

Try as she might, petitioner cannot disguise the legal nature of her claim by repackaging it as one for "make whole" relief. (Pet., p. 12.) The Eighth Circuit rejected such semantic gamesmanship in *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593 (8th Cir. 2005), a decision to which petitioner only obliquely adverts. (Pet., p. 15.)

The former employee in *Calhoon* argued that he would not be "made whole" under section 502(a)(3) unless he recovered the benefits he would have been paid if not for his employer's breach of fiduciary duty. 400 F.3d at 595. Reflecting the rationale undergirding *Knieriem, supra,* the court noted that relief under section 502(a)(3) "may be considered equitable only if it seeks not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 597. The court elaborated:

> Monetary damages that are compensatory in nature are traditionally considered to be legal relief because they focus on the

> plaintiff's losses and seek to recover in money the value of the harm done to the plaintiff instead of punishing the wrongdoer by taking his ill-gotten gains.
>
> In determining whether the nature of the monetary relief sought is equitable or legal, we ask whether the value of the harm done that forms the basis of the damages is measured by the loss to the plaintiff or the gain of the defendant, and whether the money sought is specifically identified as belonging in good conscience to the plaintiff and can clearly be traced to particular funds or property in the defendant's possession.

Id. at 597. (Citations and internal quotations omitted). Building on this analytical framework, the foundation for which the Supreme Court poured, the court in *Calhoon* ruled that the relief sought "cannot be characterized as anything other than legal relief" because it would "impose personal liability on the defendant," was "measured by the plaintiff's loss," and "d[id] not involve traceable funds that belonged to the plaintiff and [were] being unlawfully held by the defendant." *Id.* at 598.

Particularly apposite in this regard is the Fifth Circuit's decision in *Amschwand v. Spherion Corp.*, *supra*. The court there ruled that "extracontractual, or 'make whole' damages in the form of life insurance benefits that would have accrued to a plan beneficiary but for a plan fiduciary's breach of fiduciary

duty" were not recoverable under section 502(a)(3). *Amschwand*, 505 F.3d at 347.

In language equally applicable here, the Fifth Circuit reasoned that "Spherion never maintained possession of Amschwand's insurance proceeds, yet possession is the key to awarding equitable restitution in the form of a constructive trust or equitable lien." *Id.* Instead, "Amschwand seeks relief – whether characterized as make-whole or restitutionary – that is legal in nature because it represents damages on the insurance contract that Spherion allegedly breached." *Id.* "Obtaining the lost policy proceeds," the court thus concluded, "is simply a form of make-whole damages [which] is not equitable in derivation, but is akin to the legal remedies of extra-contractual or compensatory damages." *Id.* at 348.

Petitioner's penultimate argument is that she actually seeks relief "in the nature of specific performance, or imposing a constructive trust such that the Pichoff estate will be entitled to the same benefits it would have received but for the fiduciary's breach of its duty to Dr. Pichoff." (Pet., p. 9.) Of course, this is just another way of saying that appellant "seeks legal relief: . . . nothing less than the imposition of liability on [appellees] in the form of compensatory and monetary damages, because of [their alleged] failure to honor the oral representation [they supposedly] made to her husband" concerning maintenance of his existing life insurance coverage. *Todisco v. Verizon Commc'ns, Inc.*, 497 F.3d 95, 100 (1st Cir. 2007). It is by no means surprising that petitioner

deems such relief to be "appropriate." (Pet., p. 15.) As delineated above, however, such relief is by no means "equitable."

In the face of this uniformly negative precedent, petitioner is left to remonstrate that "the cramped application of 29 U.S.C. § 1132(a)(3) absolves the fiduciary of *any* duty to its beneficiary, rather than holding it to the *highest* legal duty." (Pet., p. 14.) (Emphasis in original). That is a glaring *non-sequitur*.

Hewing to the text of section 502(a)(3) does not undermine a beneficiary's right to hold a fiduciary liable for breach of its duties. Rather, it merely underscores that Congress deliberately restricted the range of remedies available to redress a breach of those duties. Therefore, this Court "must respect Congress's decision to limit relief, however desirable it might be to grant it to a particular plaintiff." *Calhoon, supra,* 400 F.3d at 598.

CONCLUSION

In whatever equitable language she tries to enshroud it – be it "make whole" or "specific performance" relief, petitioner cannot transform the true nature of her claim. Under any nomenclature or measurement, the claim is one for money damages, the hallmark of legal relief. It inexorably follows that the claim is foreclosed by the text of 29 U.S.C. § 1132(a)(3)(B) of ERISA.

As the lower courts correctly concluded, the money damages sought by petitioner are in the nature of legal relief and not cognizable under ERISA. Petitioner sought to impose personal liability on respondents, a remedy which is measured by petitioner's loss, and does not involve traceable funds in possession of respondents that belong to petitioner. Accordingly, there is no reason, much less any compelling reason, to grant the petition.

Respectfully submitted,

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